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Staten Island Cable LLC d/b/a Time Warner Cable of New York City and Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO and D.M. & M. Cable Services, Inc., d/b/a Advantage Cable. Case 29–CE–118

March 8, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On September 17, 2003, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondents each filed exceptions and a supporting brief. The General Counsel filed an answering brief. Respondent Time Warner filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondents violated Section 8(e) of the Act by entering into a collective-bargaining agreement that included a union signatory clause, and by reaffirming and giving effect to that provision. The judge’s recommended Order would, inter alia, require Respondent Time Warner Cable of New York City to resume the subcontracting of work to Advantage Cable, and would also require the Respondents to inform Advantage Cable that they have no objection to such subcontracting. We have concluded, however, that, in the circumstances of this case, this remedy is inappropriate. More specifically, we do not think it appropriate to order Respondent Time Warner to resume the subcontracting of work to Advantage Cable. The Act requires only that Respondent Time Warner not refuse, pursuant to an agreement with Respondent Local 3, to subcontract to Advantage Cable because Advantage is not signatory to a contract with Local 3. Insofar as the Act is concerned, Respondent Time Warner is free, based on other considerations, to resume that subcontract or not. Accordingly, we have modified the judge’s recommended Order as indicated below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Staten Island Cable LLC d/b/a Time Warner Cable of New

York City, its officers, agents, successors, and assigns, and Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, Flushing, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Respondent Time Warner shall notify D.M. & M. Cable Services, Inc., d/b/a Advantage Cable in writing that Respondent Time Warner will not refuse to subcontract work to Advantage Cable because of the absence of a collective-bargaining agreement between Advantage Cable and Respondent Local 3.”

2. Substitute the following for paragraph 2(b).

“(b) Respondent Local 3 shall notify Respondent Time Warner and D.M. & M. Cable Services, Inc., d/b/a Advantage Cable in writing that Respondent Local 3 will no longer require Respondent Time Warner to subcontract any unit work to an employer or subcontractor that has a collective-bargaining agreement with Respondent Local 3.”

3. Substitute the attached notices for those of the administrative law judge.

Dated, Washington, D.C. March 8, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enter into, reaffirm and give effect to Section 7(a), the union signatory subcontracting clause, of our collective-bargaining agreement with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO.

WE WILL notify D.M. & M Cable Services, Inc., d/b/a Advantage Cable, in writing, that we will not refuse to subcontract work to Advantage Cable because of the absence of a collective-bargaining agreement between Advantage Cable and Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO.

APPENDIX B

NOTICE TO MEMBERS

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WE WILL NOT enter into, reaffirm and give effect to Section 7(a), the union signatory subcontracting clause, of our collective-bargaining agreement with Staten Island Cable LLC d/b/a Time Warner Cable of New York City.

WE WILL notify Time Warner Cable and D.M. & M Cable Services, Inc., d/b/a Advantage Cable, in writing, that we will no longer require Time Warner to subcontract any unit work to an employer or subcontractor that has a collective-bargaining agreement with us.

TIME WARNER CABLE OF NEW YORK CITY

Nancy B. Lipin, Esq., and Nancy Riebstein, Esq., for the General Counsel

Norman Rothfeld, Esq., of New York, New York, for Respondent Local No. 3.

Kenneth A. Margolis, Esq., (Kauff, McClain & McGuire) of New York, New York, for Respondent Staten Island Cable.
Martin Gringer, Esq., (Franklin & Gringer, P.C.) of Garden City, New York, for Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on May 28, 2003. The Complaint alleges that Respondents entered into a collective-bargaining agreement in violation of Section 8(e) of the Act. Respondent Staten Island Cable denies that it has violated the Act and asserts that the Complaint is barred by Section 10(b). Respondent Local 3 denies that it has violated the Act and asserts that its acts are protected by the First Amendment. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Local 3 on July 1, 2003, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent Staten Island Cable LLC d/b/a Time Warner Cable of New York City, is a limited liability company located at 100 Cable Way, Staten Island, New York, engaged in the operation of a cable television system in Staten Island, New York. Time Warner Cable annually purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New York. I find that Time Warner is an employer within the meaning of Section 2 (2), (6), (7), and 8(e) of the Act. D.M. & M. Cable Services, Inc., d/b/a Advantage Cable, is a domestic corporation with its principal office at 609 Indian Church Road, Seneca, New York and a place of business located at 100 Cable Way, Staten Island, New York. Advantage is engaged in the business of installing cable television systems. Annually Advantage purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New York. I find that Advantage is an employer and a person within the meaning of Section 2 (1), (2), and 8(e) of the Act. I find that Respondent Local 3 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

It is undisputed that for a number of years, beginning around 1992 or 1993, Time Warner subcontracted a portion of its cable installation work to Advantage. About 10 or 15 employees of Advantage performed cable installation for Time Warner. Time Warner also subcontracted work to other companies. Advantage did not perform any other cable installation work in New York City.

Time Warner and Local 3 are parties to a collective-bargaining agreement with a term from April 1, 2002 to February 28, 2005, covering Electronic Technicians.

Section 6 of the Time Warner-Local 3 collective-bargaining agreement defines three types of covered work. These are Cable work, Cable Modem work and Telephony work.

Section 7 of the contract provides:

¹ Counsel for the General Counsel's unopposed Motion to Correct Transcript is hereby granted. In addition, the transcript is hereby corrected so that at page 12, line 18 it reads "the reporter has two copies"; at page 17, line 7, the phrase should read "they were not successful."

(a) The Company shall have the right to subcontract the work referred to in Section 6 of the Agreement with companies having agreements with the Union similar to this Agreement and providing such subcontracting is not done for the purpose of laying off employees.

Advantage and Local 3 were parties to successive collective-bargaining agreements beginning in 1992 or 1993. The last such contract had an expiration date of March 31, 2003.

On January 8, 2003 Lance Van Arsdale, business representative of Local 3, sent the following letter to Donald Rosenbaum, the president of Advantage:²

In accordance with the collective bargaining agreement by and between your company and the International Brotherhood of Electrical Workers, Local Union No. 3, this is to advise you that Local Union No. 3 desires to terminate its agreement with your company on its termination date of March 31, 2003, and will not be renewing your contract.

Rosenbaum discussed the letter with his partner Mark Berube, the vice president of Advantage. On January 14 Berube replied to Van Arsdale in the following letter:³

I am in receipt of your letter dated January 8, 2003 in which you state your intention not to renew our contract. Needless to say, I was shocked by this information inasmuch as we have always had a good relationship with the union and I am unaware of any reasons why Local 3 would want to take such a position. If the union persists in this position, the resulting loss of the Staten Island Cable work would have a devastating economic impact on the company. It is our desire to negotiate a new contract with Local 3. Please contact me so that we can set up a date for negotiations for a new agreement.

I look forward to hearing from you.

Local 3 and Advantage did not meet and did not negotiate a new collective-bargaining agreement.

At one point, Advantage vice president Berube spoke to Van Arsdale who stated that he did not know who D.M. & M. Cable or Advantage were. Van Arsdale requested that Berube fax him copies of certificates of insurance and the d/b/a filing. Berube sent copies of these documents to Van Arsdale. Berube said that throughout the period when Advantage had a contract with Local 3 monthly dues forms were mailed by the Union to the Buffalo address of Advantage and monthly dues deductions checks were sent to the Union on a D.M. & M. Cable Services check.⁴ The same checks were used to make contributions to the benefit funds on behalf of employees.

Berube stated that he did not receive any response from Van Arsdale to his January 14 letter expressing surprise that the collective-bargaining agreement would not be renewed. On March 31 Berube received a message on his office answering

machine from Peter Schwab, the Time Warner director of operations on Staten Island, stating that because Advantage no longer had a union agreement, Time Warner would not be allowed to subcontract to Advantage. On April 1 Berube telephoned Schwab who reiterated that Time Warner could no longer contract installation work to Advantage because Advantage did not have an agreement with Local 3. Berube asked why this was so and Schwab replied that it was due to the arrangements that Time Warner has with Local 3. Schwab said that Advantage would have 1 week to remove its vehicles and clean out its Cable Way office. Schwab said this had nothing to do with the quality of the work performed by Advantage "it was just basically due to us not having a union agreement."

Time Warner admits that on April 1 it notified Advantage that it would no longer do business with it because it did not have a contract with Local 3.

Donald Rosenbaum testified without contradiction that the last time Advantage performed cable installation work on Staten Island for Time Warner was March 29.

Time Warner admits, and there is no contradictory testimony or evidence on the record, that on April 4 Local 3 notified Time Warner that if Time Warner did business with Advantage, Local 3 would initiate a grievance and arbitration against Time Warner pursuant to Section 7 of their collective-bargaining agreement.

Howard Szarfarc, the senior vice president of Time Warner Cable, testified that on April 4 he was party to a conference call with Local 3 representatives Van Arsdale and Chris Erickson, Local 3 attorney Rothfeld and Time Warner attorneys Margolis and Kathy Scott. During this call, Szarfarc informed Local 3 that Time Warner might voluntarily cease giving effect to the clause of their collective-bargaining agreement that prohibited subcontracting to companies that did not have a contract with Local 3 and once again give work to Advantage. Van Arsdale said he would strongly object if Time Warner were to give work to Advantage. Van Arsdale said Local 3 would initiate a grievance and arbitration against Time Warner to enforce the contract in the event that Time Warner gave work to Advantage.

Advantage Cable filed a charge on April 9 alleging that Time Warner and Local 3 violated Section 8(e) of the Act by entering into a collective-bargaining agreement in which Time Warner agreed not to do business with another employer or person.

On May 7 United States District Judge Nina Gershon issued a preliminary injunction under Section 10(l) of the Act enjoining and restraining Time Warner and Local 3 from giving force or effect to Section 7 of their current collective-bargaining agreement.

Rosenbaum testified, without contradiction by any other evidence, about the relations between Time Warner and Advantage in 2002 and 2003. Rosenbaum's primary contact at Time Warner was director of operations Schwab. Rosenbaum attended monthly subcontractor meetings at Time Warner which were conducted by Schwab to discuss installations, contract negotiations and pricing. Other Time Warner employees attended the monthly meetings including Brian Kelly a vice president and general manager for Time Warner on Staten Island, Ralph Santiago the installation supervisor, and Vinnie

² Rosenbaum identified himself as president of D.M. & M. Cable Services, a corporation which operates under the names Advantage Cable.

³ All the events discussed in this decision took place in 2003 unless otherwise indicated.

⁴ Seneca is near Buffalo, New York.

Uliano the general foreman. At the September and October 2002 meetings Schwab and Kelly informed the subcontractors that Time Warner would not renew their contracts unless they had a collective-bargaining agreement with Local 3. Rosenbaum identified two documents as the written agendas distributed by Time Warner at the September 12 and October 10, 2002 subcontractor meetings. These agendas state that the contracts between various subcontractors, including Advantage, end in December or the fourth quarter of 2002 and say, "For the record, we will not negotiate a contract with any Installation Contractor until they have a signed a new agreement (sic) with Local 3 beyond March of 2003."

Discussion and Conclusions

There are no issues of credibility in this case. None of the testimony in the record was contradicted by any other testimony or evidence.⁵

It is clear that Section 7(a) of the Time Warner–Local 3 collective-bargaining agreement prohibits Time Warner from subcontracting work to Advantage because Advantage does not have a similar collective-bargaining agreement with Local 3. The record evidence establishes that Time Warner ceased subcontracting work to Advantage on March 29 because Advantage would no longer be a signatory to a contract with Local 3.

The purpose of Section 8(e) was explained by the Supreme Court in *National Woodwork Mfrs. Ass'n. v. NLRB*, 386 U.S. 612 (1967). The Court held that Congress meant to prohibit secondary objectives that were not designed to preserve work traditionally done by the primary employer's employees. 386 U.S. at 641–642. In this case, Section 7(a) of the collective-bargaining agreement violates the prohibition of Section 8(e) of the Act because the "employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person. . . ." The secondary objective is made out by the fact that the Time Warner contract is addressed to the labor relations of Advantage and its lack of an agreement with Local 3. There is absolutely no testimony or other competent evidence in the record that Section 7(a) had a motive of preserving work for the unit employees of Time Warner. Section 7(a) of the contract between Local 3 and Time Warner is "tactically calculated to satisfy union objectives elsewhere" and is not "addressed to the labor relations of the contracting employer". 386 U.S. at 644–645. As the Board said in *Chicago Dining Room Employees (Clubmen, Inc.)*, 248 NLRB 604, 606 (1980), "It is well settled that contract clauses which purport to limit . . . subcontracting to employers who are signatories to union contracts, so-called union signatory clauses, are proscribed by Section 8(e)." footnote omitted.

Thus, I find that Section 7(a) of the collective-bargaining agreement violates Section 8(e) of the Act.

The facts recited above establish that at various times within the 6 months before the filing of the Charge herein on April 9, 2003 both Local 3 and Time Warner reaffirmed and gave effect to the unlawful provision of their collective-bargaining agreement. Time Warner ceased subcontracting work to Advantage

on March 29. On March 31 and April 1 Schwab told Berube that Time Warner would no longer subcontract installation work to Advantage because it did not have an agreement with Local 3. On April 4 Van Arsdale told Szarfarc and other representatives of Time Warner that he would strongly object if Time Warner were to resume giving work to Advantage and that Local 3 would initiate a grievance and arbitration to enforce the unlawful provisions of Section 7(a) of the collective-bargaining agreement. These actions satisfy the statutory language that it shall be "an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied" that violates the prohibitions of Section 8(e). *Dan McKinney Co.*, 137 NLRB 649, 654 (1962).

CONCLUSIONS OF LAW

1. By entering into Section 7(a) of their collective-bargaining agreement and by reaffirming and giving effect to Section 7(a), Respondent Time Warner and Respondent Local 3 violated Section 8 (e) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents must cease and desist from enforcing Section 7(a) of their collective-bargaining agreement. Local 3 must inform Time Warner and Advantage that it has no objection to the subcontracting of installation work to Advantage. Time Warner must inform Advantage that it has no objection to subcontracting work to it and Time Warner must resume subcontracting to Advantage.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Staten Island Cable LLC d/b/a Time Warner Cable of New York City, Staten Island, New York, its officers, agents, successors, and assigns, and the Respondent Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, Flushing, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Entering into, reaffirming and giving effect to Section 7(a) of their collective-bargaining agreement.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respondent Time Warner shall inform D.M. & M. Cable Services, Inc., d/b/a Advantage Cable that it has no objection to subcontracting work to it and Time Warner shall resume subcontracting work to Advantage.

(b) Respondent Local 3 shall inform Time Warner and D.M. & M. Cable Services, Inc., d/b/a Advantage Cable, that it has

⁵ Arguments of Counsel cannot take the place of competent sworn testimony or properly admitted record evidence.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

no objection to the subcontracting of work by Time Warner to Advantage.

(c) Within 14 days after service by the Region, Respondents shall post at their respective facilities in Staten Island, New York and union office in Flushing, New York, copies of the attached notices marked "Appendix A and Appendix B."⁷ Copies of the notices, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Time Warner has gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notices to all current employees and former employees employed by the Respondent Time Warner at any time since March 29, 2003.

(d) Within 21 days after service by the Region, both Respondents shall file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. September 17, 2003

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⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

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Choose not to engage in any of these protected activities.

WE WILL NOT enter into, reaffirm and give effect to Section 7(a), the union signatory subcontracting clause, of our collective-bargaining agreement with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO.

WE WILL inform D.M. & M. Cable Services, Inc., d/b/a Advantage Cable, that we have no objection to subcontracting work to it.

WE WILL resume subcontracting work to Advantage Cable.

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